No. 77-906

# In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICK M. SCHOTT, ET UX., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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The sole question presented in this federal income tax case is whether the decision below correctly held that petitioner[1] could not claim a deduction for his unreimbursed campaign expenses incurred in his successful bid for election to a state court judgeship.

In 1972, petitioner, a practicing attorney, waged a successful campaign for election to a state court judgeship in Louisiana. During the campaign, petitioner incurred various campaign expenses that were not reimbursed (Pet. App. A-5).

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[1]References to "petitioner" are to Patrick M. Schott. Joan G. Schott is a party because she filed a joint return with her husband for the year at issue.

On his 1972 tax return, petitioner claimed a deduction for his unreimbursed campaign expenses. On audit, the Commissioner of Internal Revenue disallowed this deduction on the ground that campaign expenses were not deductible as ordinary and necessary expenses incurred either in carrying on a trade or business or in the production of income. In this refund suit brought by petitioner in the United States District Court for the Eastern District of Louisiana, the district court upheld the Commissioner's determination (Pet. App. A-2 to A-7). The court of appeals affirmed *per curiam* (Pet. App. A-1).

1. Petitioner's claim for a deduction for campaign expenses is foreclosed by this Court's decision in *McDonald* v. *Commissioner*, 323 U.S. 57. There, the taxpayer accepted a temporary appointment to a state court judgeship. Subsequently, he stood for election to the judgeship to which he had been appointed. In order to obtain the support of his political party, he was obligated to pay an assessment to the party fund. After losing the election, the taxpayer sought to deduct the assessment as well as his other campaign expenses.

The Court held that the campaign expenses and assessment were not deductible under the predecessors of Sections 162 (trade or business expenses) and 212 (expenses incurred for the production or collection of income) (26 U.S.C.). The plurality opinion stated that the disallowance of such a deduction had been consistently reflected by legislative history, court decisions,[2] Treasury Regulations,[3] and Treasury administrative practice.

[2]The lower courts have consistently continued to deny deductions for personal campaign expenses. *E.g.*, *Nichols* v. *Commissioner*, 511 F. 2d 618 (C.A. 5) (*en banc*), certiorari denied, 423 U.S. 912; *Levy* v. *United States*, 535 F. 2d 47 (Ct. Cl.); *Hakim* v. *Commissioner*, 512 F. 2d 1379 (C.A. 6), certiorari denied, 429 U.S. 930; *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4), certiorari denied, 345 U.S. 969.

[3]This rule of nondeductibility is embodied in Treasury Regulations, Sections 1.162-20(c) and 1.212-1(f) (26 C.F.R.).



Contrary to petitioner's argument (Pet. 5-7), the considerations set forth in *McDonald* for disallowing a deduction for election campaign expenses are fully applicable to this case. Both the expenses here and in *McDonald* were incurred in seeking election to public office.[4] As the plurality opinion noted in *McDonald*, the relationship between expenses incurred in securing election to public office and a tax deduction involves issues of far reaching importance which Congress should address (see 323 U.S. at 63-65). However, Congress has never enacted any provision allowing the deduction petitioner seeks. Instead, it has generally denied deductions for political contributions.[5] There is accordingly no statutory basis for petitioner's claimed deduction.

2. Contrary to petitioner's further assertion (Pet. 8), *McDonald* and its progeny in the lower courts do not conflict with the Tax Court's decisions in *Primuth* v.

[4]Petitioner alternatively argues (Pet. 9-10) that his campaign expenses are deductible as advertising expenses. But there is nothing in the record that suggests that there was any connection between the expenses and his law practice. The origin of these expenses was petitioner's desire to be elected to public office, not the desire for increased legal business. The expenses are therefore not deductible as advertising expenses. *Maness* v. *Commissioner*, 54 T.C. 1602, 1604-1607.

[5]See, *e.g.*, Section 162(e)(2) (nondeductibility as business expenses of amounts contributed to political campaign or efforts to influence legislation); Section 170(c)(2) (denying charitable contribution deductions with respect to gifts to political campaigns or organizations engaged in influencing legislation); Section 271 (providing that a taxpayer may not deduct as bad debts amounts owed to him by a political party); Section 276 (disallowing deductions for certain indirect contributions to political parties); Section 501(c)(3) (denying tax-exempt treatment to any organization which devoted a substantial part of its activities to influencing legislation or participating in political campaigns); Section 4945(a), (d)(1) and (e) (imposing a tax on the expenditures of a private foundation made for the purposes of influencing legislation) (26 U.S.C.).

*Commissioner*, 54 T.C. 374; *Kenfield* v. *Commissioner*, 54 T.C. 1197; and *Cremona* v. *Commissioner*, 58 T.C. 219, upholding claimed deductions for employment agency fees. Apart from the fact that this Court does not resolve conflicts between the Tax Court and the courts of appeals, the Tax Court has stated that the policy considerations present in the political sphere distinguish campaign expenses from expenses incurred in a search for employment. *Martino* v. *Commissioner*, 62 T.C. 840, 844-845. See also *Nichols* v. *Commissioner*, 511 F. 2d 618, 620 (C.A. 5) (*en banc*), certiorari denied, 423 U.S. 912.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

FEBRUARY 1978.